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Gary A. Porter dba Porter & Sons Construction v. West American Finance Corporation : Reply Brief

Utah Court of Appeals

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Law Office of Steven H. Lybbert; Attorney for Defendant/Appellee.

Brian W. Steffensen; Attorney for Plaintiff/Appellant.

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IN THE UTAH COURT OF APPEALS

**GARY A. PORTER dba PORTER
& SONS CONSTRUCTION**

**Plaintiff/Appellant,
vs.**

Case. No. 940744-CA

**WEST AMERICAN FINANCE
CORPORATION, a Utah corporation,
and OLYMPUS**

Priority No. 15

Defendants/Appellees.

APPELLANT GARY A. PORTER'S REPLY BRIEF

**On Appeal from the Judgment of
the Third District Court for
Salt Lake County, State Of Utah
The Honorable Timothy R. Hanson**

**UTAH COURT OF APPEALS
BRIEF**

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FILED

AUG 14 1995

COURT OF APPEALS

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TABLE OF AUTHORITIES

No authorities were cited in this Reply Brief.

Appellant's Reply Brief

This appeal is very simple. A motion for Summary Judgment can only be granted if there is no issue of material fact. The defendant/appellee West American Finance Corporation ("West American") claimed in its motion for summary judgment that the plaintiff/appellant Gary Porter's ("Porter") counsel, Dale Dorius, had entered into a settlement agreement binding upon Porter. All Porter needed to do to defeat this motion for summary judgment was to provide a sworn statement that no such settlement agreement had ever been reached -- thereby refuting West American's essential material facts. This is exactly what Porter did via the following verified Statement of Disputed Facts:

1. Plaintiff admits that the parties discussed settlement, but denies that any agreement was reached (refutes Defendants' Statement of Facts Nos. 1-6).

2. From the letters attached to the Affidavit of Steven H. Lybbert as exhibits, the following chronology is apparent:

(a) On August 31, 1993, defendants offered to settle for \$22,465 (the principal less \$3135) plus an additional discount for payments purportedly made by defendants to one of plaintiff's suppliers (See Exhibit A to the Lybbert Affidavit);

(b) Plaintiff counter-offered that he would agree to a total discount of \$3135 in settlement of his claims -- no agreement to any additional discount for the purported payments to plaintiff's supplier (See Exhibit B to the Lybbert Affidavit);

(c) Defendants continued to try and get plaintiff to agree to the \$3135 discount plus an additional discount for the purported payment to plaintiff's supplier (See Exhibits C through F to the Lybbert Affidavit);

(d) But, the plaintiff never acknowledged in writing or otherwise that these counter-proposals were acceptable -- rather, on December 8, 1993, plaintiff documented his position that no discount beyond the \$3135 was ever agreed to by him (See Exhibit G to the Lybbert Affidavit). (refutes Defendants' Statement of Undisputed Facts Nos. 1-6)

Clearly, the motion for summary judgment never should have been granted.

Any confusion that might have existed in this regard was resolved when Porter provided the trial court with an affidavit from attorney Dale Dorius in which Dorius stated that no final agreement as to settlement had been reached as follows:

"3. That there was an agreed to settlement of the principal amount owed to Plaintiff plus eight percent interest minus \$3135.00, and Defendant would drop the \$11,000.00 counterclaim set off.

4. There was not a finalized agreement as to the amount that Defendant could offset for the Pioneer Truck charges.

5. The outstanding issue is whether or not Defendant paid Pioneer Trucking, and if these amounts are proper offsets. This appears to be the only dispute in regard to the settlement."

Yet, the trial court refused to set aside the summary judgment.

If ever there was a case where a summary judgment was improperly granted, this is it. This summary judgment should be set aside in the interest of justice, and appellant Gary Porter's appeal should be granted.

Respectfully submitted this 14th day of August, 1995.



Brian W. Steffensen

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 1995, I caused four true and correct copies of the foregoing instrument to be xxx mailed, postage prepaid; and a single copy to be hand-delivered by xxx fax and/or by personal delivery; addressed to:

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